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United States  
Court of Appeals  
For the Ninth Circuit

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S. P. BEECHER,

*Appellant,*

vs.

THE LEAVENWORTH STATE BANK  
and THE FEDERAL LAND BANK  
OF SPOKANE,

*Appellees.*

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BRIEF FOR APPELLEES

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## SUBJECT INDEX

*Page*

The order of the Court of April 9, 1948, terminating the stay order of May 6, 1946, is substantiated by the record.....	1 to 7
The order of the Court of December 20, 1948, affirming the order of the Com- missioner of June 1, 1948, is supported by the record.....	7 to 10
The District Judge did not abuse his dis- cretion in denying appellant's applica- tion for continuance of hearings set for January 27, 1948, and March 29, 1948.....	11 to 15
The Commissioner did not abuse his dis- cretion in denying appellant's applica- tion for continuance of hearing set for May 26, 1948.....	11 to 15

## TABLE OF CASES

	<i>Page</i>
Clark vs. Small, 175 S. E. 475 (Ga.).....	14
Dietrich vs. U. S. Shipping Board, 9 Fed. (2) 733.....	13
Druckman vs. Forsyth Furniture, 22 Fed. (2) 59.....	14
In re Rafert, 48 Fed. Supp. 459.....	5
Paradise Land & Livestock Co. vs. Federal Land Bank, 140 Fed. (2) 102.....	10
Rafert vs. Equitable Life Society, 138 Fed. (2) 185.....	5
Worley vs. Wahlquist, 150 Fed. (2) 1007.....	5

## STATUTES

Sec. 75(S)(2) Bankruptcy Act.....	7
Sec. 75(S)(3) Bankruptcy Act.....	7

## STATEMENT OF THE CASE

The appeals by appellant, farm debtor, are from the following orders:

(1) Order of April 9, 1948, terminating the stay order of May 6, 1946 (12084 Vol. 5, 1170 to 1175).

(2) Order of District Judge of December 20, 1948 (12216 Vol. 2, 275-6), affirming order of Commissioner of June 1, 1948 (12216 Vol. 1, 67 to 73), fixing the value of property for redemption purposes.

The first order was among those appealed in Cause 12084, in which appellees moved for dismissal of the appeal from said order.

The argument in this cause is subject to the said motion to dismiss the appeal.

## ARGUMENT

THE ORDER OF APRIL 9, 1948, TERMINATING THE STAY ORDER FOR THE REFUSAL OF BANKRUPT TO FILE AN ACCOUNTING OF CROPS RAISED DURING THE STAY PERIOD IS JUSTIFIED BY THE RECORD.

On May 6, 1946, appellant was placed in possession of his property under a stay order which provided that during the three-year period he was permitted to retain possession of his property "in the custody and under the supervision and control of the court" and that such possession is contingent upon his pay-

ing a reasonable rental to be determined in the manner prescribed by law (12084 Vol. 1, 176 to 178).

Thereafter, at a meeting of creditors called for the purpose of determining rental to be paid, the Commissioner, by order of June 25, 1947, determined that 40% of the net proceeds of crops raised on the orchard property was reasonable rental, and directed the debtor to maintain accurate records showing the moneys disbursed in producing the crops, which payments were to be made by check, and also to keep an accurate record of all sales of produce made by debtor, showing the kind and amount sold, the amount received therefor, the date of sale, and the party to whom the produce was sold (12084 Vol 2, 328 to 334).

The Summary of Evidence heard by the Commissioner (12084 Vol. 2, 325 to 328) shows that debtor testified that in the vicinity of the property there was no land which was rented for cash rental and that the customary rental for such lands was a percentage of the net proceeds of crops raised and, further, that debtor testified that 40% of net proceeds was the customary rental. The Commissioner accepted the evidence of debtor as the basis for fixing the rental. The requirement that debtor should keep a record of produce sold and moneys expended was necessary because, without this record, there would be no way of determining what 40% of the net proceeds was. Debtor entered into possession of the property on May 6, 1946, and during the years 1946 and 1947



raised valuable crops of fruit thereon. He filed no reports as to the production and expenditures, but deposited in court \$9170.00 to effect a redemption (12084 Vol. 1, 203).

The creditors requested a reappraisal, and debtor petitioned for withdrawal of his petition to redeem, which was granted by order of December 10, 1947 (12084 Vol. 2, 491).

The court, however, directed that the moneys remain in the registry of the court. This was done under the power of supervision and control vested in the court. On January 5, 1948, debtor filed a petition asking that his request for payment out of the funds in court to creditors be withdrawn and, as ground therefor, stated that the moneys were probably necessary for production of 1948 crop (12084 Vol. 4, 934 to 937).

Although two crop seasons had passed since he was placed in possession under the stay order, no report of farming operations had been filed, and debtor had neither paid nor tendered any sum as rental. The court, on its motion, on January 8, 1948, entered the order requiring debtor to file a report of his farming operations for 1946 and 1947 and to endorse and deposit with the clerk all uncashed checks held by him which were the proceeds of crops raised after the stay order (12084 Vol. 4, 939 to 944).

The order recites the reasons therefor, namely, that the court could not tell whether the moneys in court

should be paid to creditors, could not determine whether the moneys in the registry of the court were necessary for production of 1948 crop, and had no way of knowing whether the moneys in court, or some part thereof, were in fact rental and should go to the creditors. Debtor did not comply with the order of court of January 27, 1948, wherein the court directed the filing of a report and the endorsement of uncashed checks on or before February 10, 1948 (12084 Vol. 5, 1064).

For failure to comply with said order, the Court, on April 9, 1948, entered an order finding debtor guilty of contumacious conduct and terminated the stay order (12084 Vol. 5, 1170 to 1175).

Debtor had almost four months' time within which to comply with the court's order, but elected to defy the court, acting on the theory that neither the creditors nor the court had any right to supervise or control his management of the property or the proceeds of crops raised.

At the hearing on January 27, 1948, Mr. Beecher was present, and the proceedings are reported in 12084 Vol. 4, 948 to 1000, and Vol. 5, 1001 to 1056. From these proceedings it appears that debtor brought into court a number of cancelled checks and claimed this was the report he expected to make; that the crops were not all sold to Wade & Co., but the cherries and apricots were sold to others, and that debtor had \$1903.00, proceeds thereof, in a safe deposit box.

All through this record it appears that the court was trying to impress on debtor that the law placed on the court the responsibility of supervision and control of the property, and that to perform this duty the court must have a report as to receipts and expenditures, and that the money should be under the supervision and control of the court until the rental was determined. This record further shows that debtor took the stand that the management of the property and the custody of moneys and the payments therefrom were no concern either of the creditors or of the court.

In *Rafert vs. Equitable Life Assurance Society*, 138 Fed. (2) 185 (C. A. 8th), the debtor refused to pay the rental into court when ordered to do so. For such refusal the district court terminated the stay order.

Affirming the order of the district court in *In re Rafert*, 48 Fed. Sup. 459, the Court of Appeals said:

“He simply and recalcitrantly refused to pay the rentals into court when he received them. He chose to defy the court’s order and to take the chance that such orders are void \* \* \* Such conduct justified the order of court terminating the three-year stay order unless he obeyed its orders within the reasonable time granted.”

In *Worley vs. Wahlquist*, 150 Fed. (2) 1007 (C. A. 8th), the appeal was from an order that debtor had contumaciously failed to comply with the rental order, and required her to file a complete accounting

of all crops raised and to make payment into court within 15 days of all rents due, and terminated the stay order unless she made the accounting within 15 days.

Affirming the order terminating the stay, the court said:

“We need not enumerate all the circumstances appearing in the record and detailed in the trial court’s memorandum opinion that demonstrate her wilful refusal to recognize the court as her landlord, under section 75, subsection s(2), 11 U. S. C. A. sec. 203, sub s(2), placing her property ‘in the custody and under the supervision and control of the court.’ Among her perversities, she had made no rental payments whatever into court at the time the hearing was held in December, 1943, although she admittedly had harvested and sold some of the crops and had also collected soil conservation payments and other rental monies; \* \* \*

“The validity and propriety of that part of the court’s order terminating appellant’s right of stay, if she did not obey the accounting and payment order and absolve her current recalcitrances, is similarly not open to attack on the facts in the record.”

Appellant urges on page 12 of his brief that the assistance of the Commissioner was necessary for the determination of income tax, the segregation of operating and upkeep expenditures, depreciation, allowances to the debtor as salary. None of these matters were within the requirements of the order of court. The court simply asked debtor to put on paper

a statement showing what fruit he had produced, what payments were made and to whom paid. The matter of income tax (if he had paid any), the salary, if any, to be allowed debtor, and whether the expenditures were for operating or for upkeep, were all matters to be considered at a future hearing. The records were all debtor's records, and the Commissioner could have been of no assistance in compiling the report.

If the custody, supervision and control vested in the court under Section 75(S)(2) of the Bankruptcy Act and the proviso of Section 75(S)(3) of said Act "if the debtor at any time fails to comply with the provisions of this section or with any orders of court made pursuant to this section \* \* \* the court may order the appointment of a trustee and order the property sold" means anything, it means that the court after the entry of the stay order has the right to know what crops were raised by the debtor and what expenditures were made in producing the crop when the rental is based on a percentage of the net proceeds, and that the refusal of the debtor, as in the case at bar, to comply with the order requiring a report justifies the court in terminating the stay.

THE ORDER OF COMMISSIONER OF JUNE 1, 1948, FIXING THE VALUE OF PROPERTY FOR REDEMPTION PURPOSES IS SUPPORTED BY THE RECORD.

The Commissioner, in holding a hearing at Wenatchee to determine the value of the property for redemption purposes, did not act pursuant to the order of April 9, 1948, terminating the stay. The record shows that on August 4, 1947, The Federal Land Bank of Spokane filed a petition for a reappraisal (12084 Vol. 1, 216), and on August 7, 1947, the Leavenworth State Bank also filed a like petition (12084 Vol. 1, 218).

On January 27, 1948, the debtor filed a petition for a reappraisal (12084 Vol. 5, 1058).

Thus, on January 27, 1948, both the creditors and the debtor were requesting the court to have a reappraisal made.

On January 27, 1948, the court granted the request of debtor and his creditors for a reappraisal, and referred the proceeding to the Commissioner to hold a meeting and, in lieu of reappraisal, to hear the evidence and therefrom to determine the value of the property. This order is in 12084 Vol. 5, 1062.

Section 75(S)(3) of the Bankruptcy Act vests in the court the discretion to have the value determined by the Commissioner instead of by an appraisal. The reasons given by the court were that neither party would be satisfied with a reappraisal and that eventually the matter would have to be determined by the court from evidence because there was such a difference between the parties as to the value of the orchard property (12084 Vol. 4, 958 to 959).



Pursuant to the order of January 27, 1948, the Commissioner called a meeting to be held at Wenatchee on May 3, 1948. On April 30, 1948, debtor filed an application for continuance. On May 3, 1948, the Commissioner adjourned the hearing to the home of debtor where debtor was examined as to his illness, and the Commissioner continued the hearing to May 26, 1948 (Tr. 12216, Vol. 1, 1 and 2).

On May 26, 1948, a representative of debtor appeared at the hearing with a request for a continuance, and the continuance was denied; after which evidence was admitted and therefrom the Commissioner fixed the value as stated in his order of June 1, 1948 (12216 Vol. 1, 67 to 73).

This order was affirmed on petition for review by the district judge on December 20, 1948 (12216 Vol. 2, 275-6).

We shall confine this part of our brief to a consideration of the question of whether the evidence supports the findings of the Commissioner.

The Commissioner found that the orchard property was more valuable as a whole than as separate tracts, because the irrigation system was so constructed as not to be capable of being divided, and that the buildings were on one tract. The evidence of all the witnesses called was to this effect, and that the fair, reasonable value of the orchard property was \$50,000.00. No evidence was offered of a lesser value.

Appellant states on page 1 of his brief that he believes the value of the property could have been reduced to less than \$15,000.00. During the crop year of 1945, which was the year preceding the delivery of possession to debtor, the orchard property was operated by a receiver. His report for period from March 1, 1945, to February 28, 1946, shows that the sale value of fruit raised on the orchard property was \$51,808.60, and that the expenses were \$33,452.61, leaving a net profit on crops raised in 1945 of \$18,355.99 (12084 Vol. 1, 236).

Appellant submitted a budget for farm operations for year 1948 on the orchard property of \$40,350.00 (12084 Vol. 5, 1059-1060).

We submit a property which under a receiver produces a net profit of \$18,355.99 in one year must be worth in excess of \$15,000.00.

It will be noted that the claim of The Federal Land Bank of Spokane is based on a certificate of sheriff's sale held prior to the filing of a petition in this proceeding and is based on mortgage shown in 12216 Vol. 1, 43. The claim of Leavenworth State Bank is based on judgment recovered in foreclosure of a mortgage shown in 12216 Vol. 1, 37.

Under these circumstances the Court of Appeals for the Tenth Circuit in *Paradise Land & Livestock Co. vs. Federal Land Bank of Berkeley*, 140 Fed. (2) 102, held that debtor must redeem the mortgaged



property as a unit and not by separate tracts constituting the unit.

THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A CONTINUANCE OF THE HEARING HELD JANUARY 27, 1948, AND THE HEARING HELD MARCH 29, 1948, AND THE COMMISSIONER DID NOT ABUSE HIS DISCRETION IN DENYING CONTINUANCE OF HEARING HELD MAY 26, 1948.

By order of January 8, 1948, the court entered the order directing the filing of report by January 27, 1948, and also required a showing on that date why certain uncashed checks should not be endorsed and delivered to the clerk (12084 Vol. 4, 939). An unverified motion for a continuance was filed on January 12, 1948 (12084 Vol. 4, 944) which was denied on January 15, 1948 (12084 Vol. 4, 947).

The motion was not supported by any doctor's affidavit or certificate and the debtor appeared on January 27, 1948, and participated vigorously in the hearing.

Regarding the hearing of March 29, 1948, the record shows that on February 13, 1948, the court entered a show cause order returnable February 25, 1948, requiring debtor to show cause why the stay order should not be vacated (12084 Vol. 5, 1083). This hearing was continued on debtor's application therefor to March 29, 1948 (12084 Vol. 5, 1089). On the date of hearing debtor was not present. The Clerk

on the morning of said day filed an unverified petition for a continuance to which was attached an unverified statement by a doctor. The court held the application was not timely and also that the showing was not sufficient.

Regarding the action of the Commissioner in denying application for a continuance of hearing adjourned to May 26, 1948, the record shows this hearing was set originally for May 3, 1948. On this date, the debtor not being present, the Commissioner adjourned the hearing to May 26, 1948, after first examining debtor as to the extent of his illness. The application for continuance of hearing May 26, 1948, was supported only by the unverified statement of a doctor dated May 19, 1948, 7 days prior to the hearing (12084 Vol. 5, 1233).

That debtor had kidney trouble will be conceded. The question is whether his health was such that he could not be expected to attend the hearing. It will be noted that neither the motion for continuance of the hearings set before the district judge nor the certificate of the doctor in support thereof was verified, and debtor appeared and participated in the hearing of January 27, 1948.

The exhaustive record of this hearing shown in 12084 Vol. 4, 948 to 1000, and Vol. 5, 1001 to 1056, shows that debtor was in possession of all his faculties. At this hearing with reference to his illness debtor stated "He (Dr. Ramsey) said there's noth-

ing vitally wrong with me \* \* \* that I was to be quiet and keep warm and eat carefully.” (12084 Vol. 4, 957).

On May 3, 1948, the Commissioner examined debtor as to his physical condition. It was raining, but debtor was willing to show the property to Commissioner; debtor stated he was in Seattle April 26, 1948, and worked in a law library from 10:00 a.m., to 1:00 p.m., and exhibited 12 pages of notes taken while there. The debtor seemed mentally alert (12216 Vol. 1, 8 to 10).

The Commissioner continued the hearing out of desire to give debtor benefit of any doubt as to his illness. At the hearing May 26, 1948, D. J. Kenaston testified he made an inspection of the property on March 29, 1948; that debtor drove up shortly after he arrived; that debtor showed him over the property, including the houses, and that he was physically active and mentally alert. At that time debtor stated he was supposed to be in Spokane for a hearing, but did not think he was able to go (12216 Vol. 1, 11 to 12). This evidence is corroborated by that of Thomas S. Roddy who accompanied Mr. Kenaston (Vol. 1, 13 to 16).

In *Dietrich vs. U. S. Shipping Board*, 9 Fed. (2) 733 (C. A. 2nd) at 746, the rule regarding continuances in Federal courts is stated as follows:

“The continuance of a pending action or of its postponement is inherent in all courts and is

generally a matter resting in the court's discretion and reviewable only for abuse \* \* \* and generally the facts upon which an application for a continuance is based must be verified by affidavit unless they are within the judicial knowledge of the court and not open to dispute."

In *Druckman vs. Forsyth Furniture*, 22 Fed (2) 59 (C. A. 4th), application for a continuance was made on the unverified certificate of a doctor that defendant was under his professional treatment with rheumatic arthritis and that it would be several weeks before he would be able to leave town. The court denied the application for continuance.

In affirming the denial, the court said:

"It is unnecessary to cite the numerous decisions which hold that a continuance of the cause rests in the sound discretion of the trial court. The judge who has had the cause before him for a number of years, and who has the attorneys before him, is of course in much better position to determine whether an application apparently fair on its face is in reality not bona fide, but for purposes of delay, than any appellate tribunal could possibly be. In this case, the same judge who heard the case originally and before whom the various motions for continuance had been made, presided at the last trial, and heard the motion for the continuance. We see nothing in the record before us to justify the conclusion that his discretion was not properly exercised."

In *Clark vs. Small* (175 S. E. 475 (Ga.)), it was held that the condition of health of a party at time of trial must be shown to justify a continuance and that one dated four days prior thereto was insuffi-

cient. It will be noted that the certificate of doctor relied on for continuance of the hearing set before the Commissioner is dated 7 days prior to the hearing.

When all the facts regarding debtor's illness are considered, we submit the court and Commissioner exercised a sound discretion in denying the continuances.

On pages 32 to 45 of his brief, appellant has assigned certain supplemental specifications of error. Such thereof as are pertinent to the orders involved in this appeal have been considered. Others pertain to the orders appealed in cause 12084, which have been briefed in that cause and will not be repeated in this brief.

## CONCLUSION

Debtor filed his petition for composition and extension in 1939, and this proceeding has been in court for 10 years. During the period from May 6, 1946, when the second stay order was entered, debtor has been in possession of his property under a three-year stay order. He produced valuable crops in 1946, 1947 and 1948. The rental order provided for the payment of 40% of the net proceeds of crops raised as rental. No report as to crops raised has ever been filed, and no rental has ever been paid. The court, under its power of supervision and control, was clearly within its right to require debtor to file the reports, and the persistent refusal of debtor to comply with said or-

der was such conduct as justified the court in vacating the stay order.

The order directing a reappraisal was entered on the request of the creditors and on the written application of debtor therefor, and the evidence, particularly the production record of the property, supports the finding as to value.

We submit there is no error in the record, and the orders appealed should be affirmed.

Respectfully submitted,

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